

Federal Communications Commission  
Washington, D.C.

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Re: Acceptance of Comments As Timely Filed in (CC Docket No. 96-98)

The Office of the Secretary has received your request for acceptance of your pleading in the above-referenced proceeding as timely filed due to operational problems with the Electronic Comment Filing System (ECFS). Pursuant to 47 C.F.R. Section 0.231(I), the Secretary has reviewed your request and verified your assertions. After considering arguments, the Secretary has determined that this pleading will be accepted as timely filed. If we can be of further assistance, please contact our office.

FEDERAL COMMUNICATIONS COMMISSION

*Magalie Roman Salas*  
Magalie Roman Salas  
Secretary *WFC*

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

## Implementation of the Local Competition Provisions in the Telecommunications Act of 1996

**CC Docket No. 96-98**

The Telecommunications Resellers Association ("TRA"),<sup>1</sup> through undersigned counsel and pursuant to Section 1.429(a) of the Commission's Rules, 47 C.F.R. § 1.429(a), hereby seeks reconsideration of a single, albeit critical, element of the *Third Report and Order*, FCC 99-238 (released November 5, 1999), which, unless modified, will uniquely and adversely impact small businesses, including both small competitive providers of local exchange service and small business consumers. Specifically, TRA urges the Commission to increase the universe of customers a competitive local exchange carrier ("LEC") may serve utilizing unbundled local switching obtained from an incumbent LEC to at least encompass businesses which utilize twenty five lines or less.

<sup>1</sup> A national trade association, TRA represents more than 850 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. TRA is the largest association of competitive carriers in the United States, numbering among its members not only the large majority of domestic providers of domestic interexchange and international services, but the majority of competitive local exchange carriers.

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As the Commission has recognized, "small businesses represent only a small portion of the businesses in telecommunications."<sup>2</sup> It was to remedy this under-representation of small business in the telecommunications industry that Congress directed the Commission "to identify and eliminate market entry barriers for small businesses in the provision and ownership of telecommunications and information services, and in the provision of parts or services to providers of telecommunications services and information services."<sup>3</sup> In response to this mandate, the Commission subsequently committed "to comply fully with the congressional directive of Section 257 and to advance the clear pro-competitive and deregulatory goals of the 1996 Act," by acting to "identify and eliminate market entry barriers for small businesses, to remove or reduce impediments, and to increase opportunities for small business participation in the telecommunications market."<sup>4</sup>

The under-representation of small business in the telecommunications industry, however, represents only half of the broader issue associated with small businesses and telecommunications. Small businesses have historically been the last market segment to benefit from increased competition in the telecommunications marketplace. For example, in the interexchange market, large corporate and institutional users were the initial beneficiaries of the lower prices and enhanced service quality and diversity that increasing competition prompted, obviously because of their large usage volumes and substantial revenue generation. Residential users were the next market segment to benefit from the operation of competitive market forces, primarily

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<sup>2</sup> Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Report), 12 FCC Rcd 16802, ¶ 5 (1997).

<sup>3</sup> Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Notice of Inquiry), 11 FCC Rcd 6280, ¶ 4 (1996); 47 U.S.C. § 257.

<sup>4</sup> Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Report), 12 FCC Rcd 16802 at ¶ 2.

because of the enormous breadth of the user universe. Small businesses did not see lower prices and significant service enhancements until resale carriers identified the market opportunity represented by this underserved market segment. As the Commission has repeatedly recognized, small telecommunications providers are “able to serve narrower niche markets that may not be easily or profitably served by large corporations, especially as large telecommunications expand globally.”<sup>5</sup>

TRA submits that limiting the universe of customers a competitive LEC may serve utilizing unbundled local switching obtained from an incumbent LEC to businesses which utilize three lines or less, not only creates, in direct contravention of Congressional dictates, a barrier to market entry by small businesses in the provision and ownership of telecommunications and information services but denies small business consumers the competitive benefits smaller telecommunications providers have traditionally brought to this historically underserved market segment. As the Commission has recognized, “lack of access to unbundled local switching materially raises entry costs, delays broad-based entry, and limits the scope and quality of the new entrant’s service offerings.”<sup>6</sup> This determination reflects the Commission’s recognition that “section 251(d)(2)(B) requires consideration not simply of whether denial of access to unbundled switching would impair a competitor’s ability to serve the high-volume business market that many requesting carriers are already serving, but whether the requesting carrier is impaired in its ability to provide the ‘services that it seeks to offer,’ including services to residential and *small business markets*.”<sup>7</sup>

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<sup>5</sup> Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Notice of Inquiry), 11 FCC Rcd 6280 at ¶ 6.

<sup>6</sup> Third Report and Order, FCC 99-238 at ¶ 253.

<sup>7</sup> Id. at ¶ 255 (emphasis added).

Elaborating on this analysis, the Commission explained that “the record does not support a finding that requesting carriers, as a general matter, can obtain switching from carriers other than the incumbent LEC,” and that “the total costs of self provisioning a switch impose on the requesting carrier a significant cost disadvantage relative to the incumbent LEC, particularly in its early stages of entry.”<sup>8</sup> And while the Commission noted that “[f]ixed costs are the largest portion of the cost of a switch,” it recognized that the “more critical aspect of . . . [its] ‘impair analysis is not the costs of purchasing a local circuit switch, but rather the economies of scale that may characterize local circuit switching and the additional costs that requesting carriers incur when placing their self-provisioned switches into operation.’”<sup>9</sup> Continuing this reasoning, the Commission acknowledged that “[r]equesting carriers . . . will encounter generally greater direct costs per subscriber [than incumbent LECs] when provisioning their own switches, particularly in the early stages of entry when requesting carriers may not have the large number of customers that is necessary to increase their switch utilization rates significantly.”<sup>10</sup> Indeed, the Commission referenced TRA’s showing that “smaller requesting carriers with targeted entry plans [that] deploy their own switch[es] to serve approximately 3,000 lines will incur a direct additional cost of \$300,000 annually without access to unbundled local switching” in finding that “utilizing unbundled switching is likely to mitigate this early-stage entry barrier and is consistent with Congress’ intention that requesting carriers use unbundled network elements as a transitional market entry strategy.”<sup>11</sup> Finally, the Commission

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<sup>8</sup> Id. at ¶¶ 253, 259.

<sup>9</sup> Id. at ¶ 259.

<sup>10</sup> Id. at ¶ 260.

<sup>11</sup> Id. at ¶ 261.

went on to find “that the costs of self-provisioning switching also materially diminish a requesting carrier’s ability to provide the services it seeks to offer,” highlighting the costs and burdens and delays associated with collocation and coordinated cutovers, and adding that “collocation and the coordinated loop cutover process imposes a material delay on competitive LECs that offer services using self-provisioned switches, and materially limits the scope of customers a requesting carrier may serve quickly.”<sup>12</sup>

Based on this analysis, the Commission declared that “[f]ailure to unbundle local circuit switching would cause residential *and small business* consumers to wait unnecessarily for competitive alternatives.”<sup>13</sup> Indeed, the Commission acknowledged that “[w]here unbundled switching has been made available, requesting carriers have gained market share in the residential and *small business markets*.”<sup>14</sup> Notwithstanding this conclusion, the Commission, however, found that “requesting carriers are not impaired without access to unbundled local circuit switching when they serve customers with four or more lines in density zone 1 in the top 50 metropolitan statistical areas (MSAs) . . . where incumbent LECs have provided nondiscriminatory, cost-based access to the enhanced extended link (EEL) throughout density zone 1.”<sup>15</sup> This exception was predicated principally on the finding that “the vast majority of these MSAs contain multiple switches owned

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<sup>12</sup> Id. at ¶¶ 262 - 71.

<sup>13</sup> Id. at ¶ 273.

<sup>14</sup> Id.

<sup>15</sup> Id. at ¶ 278.

by competitors,” and that “requesting carriers have deployed greater numbers of switches in areas of high customer density.”<sup>16</sup>

The unfortunate, and undoubtedly unintended, impact of this “exception to national unbundling requirement” is that small providers will be unable to compete effectively in density zone 1 in the top 50 MSAs. As TRA has demonstrated, local resale is not a viable long term business strategy.<sup>17</sup> Rather, as the Commission has recognized,<sup>18</sup> resale is a market entry vehicle, particularly for smaller carriers, for which combinations of unbundled network elements (“UNEs”) must be substituted to allow for profitable operation. Under the structure established by the Commission, small providers will not be able to utilize the UNE-based service option in density zone 1 in the top 50 MSAs, because incumbent LECs will not be required in these geographic locations to make unbundled local switching available to them and, as the Commission has found, small providers will not be able to “obtain switching from carriers other than the incumbent LEC.”<sup>19</sup> Hence, unless small providers are able to withstand (to paraphrase the Commission) the materially increased entry costs, broad-based entry delays, and the limitations on the scope and quality of service offerings attendant to a lack of access to unbundled local switching,<sup>20</sup> they will be effectively excluded from density

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<sup>16</sup> Id. at ¶¶ 280 - 84.

<sup>17</sup> Letter to Jake E. Jennings from David Gusky, Executive Vice President of the Telecommunications Association, submitted in CC Docket No. 96-98 on September 8, 1999.

<sup>18</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, ¶ 12 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, 12 FCC Rec. 12460 (1997), *aff'd/vacated in part sub. nom. Iowa Util. Bd v. FCC*, 120 F.3d 753 (1997), *writ of mandamus issued* 135 F.3d 535 (8th Cir. 1998), *aff'd/vacated in part sub. nom. AT&T Corp., et al. v. Iowa Utilities Board*, 119 S.Ct. 721 (1999).

<sup>19</sup> Third Report and Order, FCC 99-238 at ¶ 253.

<sup>20</sup> Id.

zone 1 in the top 50 MSAs. In the past, the Commission has emphatically rejected proposals to implement Section 251(c) in a manner which "would seriously inhibit the ability of potential competitors to enter local markets through the use of unbundled elements, and thus would retard the development of local exchange competition."<sup>21</sup>

Certainly, the factors cited by the Commission as potentially mitigating the identified adverse impacts of the elimination of unbundled local switching will assist small competitors the least, if at all. Initially, the mere fact that larger providers are installing local switches does not suggest that smaller providers have the financial wherewithal to do so. Moreover, installation by larger providers of local switches does not help small providers unless the larger providers are making that capability available to the smaller providers (which the Commission has conceded is not happening). While EELs may allow "requesting carriers to aggregate loops over efficient-high capacity facilities to their central switching location," the unbundled availability of EELs does not mean that small competitors will "not [be] impaired in certain circumstances without access to unbundled switching in density zone 1 in the top 50 MSAs."<sup>22</sup> Many smaller carriers will still "incur higher costs due to their inability to realize economies of scale using circuit switching equipment."<sup>23</sup> As the Commission has recognized, "the advantages of incumbent LEC scale economies are more

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<sup>21</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 1329.

<sup>22</sup> Third Report and Order, FCC 99-238 at ¶ 288.

<sup>23</sup> Id. at ¶ 260.

pronounced when requesting carriers provide switch-based service to a relatively small number of customers through a self-provisioned switch.”<sup>24</sup>

As is apparent, TRA believes the Commission erred in recognizing any exceptions to the national availability of unbundled local switching. TRA, however, is not seeking reconsideration of that judgment. Rather, TRA is seeking to mitigate the adverse impact of the unfortunate exception the Commission allowed by urging the Commission to expand the universe of customers a competitive provider may serve utilizing unbundled local switching obtained from an incumbent LEC. As noted above, the Commission has acknowledged that Section 251(d)(2)(B) requires consideration of whether denial of access to unbundled switching would impair a competitor’s ability to serve all market segments, including the “small business market[.]”<sup>25</sup> Moreover, the Commission has recognized that competitive local alternatives have to date generally been focused primarily on the “high volume business market.”<sup>26</sup> And as a result, the Commission sought “to distinguish between the mass market and the medium and large business market for purposes of . . . [its] unbundling analysis.”<sup>27</sup>

The principal flaw in the Commission’s effort in this regard is that it assigned a large segment of small businesses to “the medium and large business market” by setting the line threshold by which it defined small business far too low. In today’s telecommunications environment, three lines effectively limits the “small business market” to home-based businesses. A three line threshold

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<sup>24</sup> Id.

<sup>25</sup> Id. at ¶ 255.

<sup>26</sup> Id.

<sup>27</sup> Id. at ¶ 292.

allows for a voice line, a fax line and a modem line, and nothing else. Three lines thus will generally support only a single individual. An office manned by more than one individual which utilizes Internet access would be hard pressed to operate with three lines. Thus, if the historically underserved small business market is to derive the full benefits of competition, including that provided by the smaller carriers that have traditionally driven competition in this market segment, the line ceiling above which local switching will not be available in density zone 1 in the top 50 MSAs must be increased to at least 25. A threshold set at this level should allow smaller carriers to compete by providing them with a UNE-based service option and the presence of such providers in the market should ensure that small businesses are not denied the benefits of competition as they were too long denied such benefits in the interexchange market.

Including within the small business category entities which use up to 25 lines would be fully consistent with the Commission's definitional approach to small business in other contexts. "The Commission has historically used a number of different size standards to define small businesses, depending on the particular communications service,"<sup>28</sup> but none of these "size standards" approach the infinitesimally small level utilized in the *Third Report and Order*. Thus, for example, the Commission has defined a "small business" as an entity which has "gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million"<sup>29</sup>; alternatively, a "small business" has been defined as "together with its affiliates has average annual

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<sup>28</sup> Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Report), 12 FCC Rcd 16802 at ¶ 21.

<sup>29</sup> 47 C.F.R. § 24.709(a)(1).

gross revenues that are not more than \$40 million for the preceding three calendar years".<sup>30</sup> The Commission, in other circumstances, has defined a "small business" utilizing a \$40 million threshold and utilized a \$15 million threshold to define a "very small business."<sup>31</sup>

TRA is certainly not advocating a definition of "small business" in this context as a firm generating \$500 million, \$125 million, \$40 million or even \$15 million in annual revenues. TRA recognizes that "the more appropriate course is to continue to adopt specific size standards tailored to individual services."<sup>32</sup> The Commission should, however, be guided here by its past determinations of what constitutes a small business, and it is painfully obvious that the tremendous gulf between the types of firms which can generate annual revenues in any of the above ranges and the types of firms which can comfortably conduct day-to-day affairs utilizing a maximum of three lines cannot be ignored.

If the Congressional mandates embodied in not only Section 257, but Section 251(c), are to be honored, TRA submits that the Commission must narrow the gap between the "small business market[]"-- which continues to be underserved at the local level -- and the "medium and large business market" -- which the Commission believes is being adequately served at least in zone 1 of the top 50 MSAs. In narrowing that gap, TRA would obviously love to see the threshold for availability of unbundled local switching set at 100 or more lines, but believes that the interests of

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<sup>30</sup> Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap (Report and Order), 11 FCC Rcd. 7824, 7852 (1996).


<sup>31</sup> Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems (Second Report and Order), 12 FCC Rcd. 2731, 2811 (1997).

<sup>32</sup> Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Report), 12 FCC Rcd 16802 at ¶ 26.

small local service providers would be adequately met by use of a ceiling of 25 lines. Accordingly, TRA urges the Commission to reconsider its determination that unbundled local switching will not be available in density zone 1 in the top 50 MSAs to serve businesses with more than three lines and modify Section 51.319(c)(1)(B) by replacing "four or more voice grade DSO equivalents or lines" with "twenty five or more voice grade DSO equivalents or lines."

Respectfully submitted,

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